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10 Attorneys for Lead Plaintiff
11 THE WHITE TRUST GROUP and the Class

12 **IN THE UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 SANDRA LIFSCHITZ, on behalf of herself
15 and all others similarly situated,

16 Plaintiff,

17 v.

18 NEXTWAVE WIRELESS INC., ALLEN
SALMASI, GEORGE C. ALEX and
19 FRANK A. CASSOU,

20 Defendants.

21 ALEX BENJAMIN, Individually and on
behalf of all others similarly situated,

22 Plaintiff,

23 v.

24 NEXTWAVE WIRELESS INC., ALLEN
SALMASI, GEORGE C. ALEX and
25 FRANK A. CASSOU,

26 Defendants.

CASE NO. 3:08-CV-01697-LAB (WMc)
(consol. w/3:08-CV-01934-LAB (WMc))

CLASS ACTION

**NOTICE OF RECENT AUTHORITY IN
SUPPORT OF PLAINTIFFS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE
CONSOLIDATED COMPLAINT**

JUDGE: Honorable Larry Allen Burns
CTRM: 9

1 TO THE COURT, ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that, on October 28, 2009, the Ninth Circuit Court of Appeals
4 issued an order in *Siracusano v. Matrixx Initiatives, Inc.*, No. 06-15677, 2009 U.S. App. LEXIS
5 23716 (9th Cir. Oct. 28, 2009). The order is attached as Exhibit A. The order addresses issues
6 that are relevant to Plaintiffs' Memorandum and Points of Authority in Opposition to Defendants'
7 Motion to Dismiss the Consolidated Complaint which is currently pending before the Court.
8 Specifically, the Ninth Circuit held:

9 In *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982 (9th Cir. 2008), the
10 defendants argued that a passage in the company's SEC filings regarding
11 backlogged work alerted reasonable investors to the risk that the company might
12 not get paid for work that had actually been stopped. We rejected the argument,
13 stating that "[t]he passage . . . speaks entirely of as-yet-unrealized risks and
14 contingencies. Nothing alerts the reader that some of these risks may already have
15 come to fruition, and that what the company refers to as backlog includes work
16 that is substantially delayed and at serious risk of being cancelled altogether." *Id.*
17 at 986. . . . Similar to *Berson*, the passage in the Form 10-Q speaks about the risks
18 of product liability claims in the abstract, ***with no indication that the risk "may
19 already have come to fruition."***

20 *Id.* at *35-*36 (emphasis added and citations omitted). The court held further:

21 The Supreme Court has stated, however, that "[w]hile it is true that motive can be
22 a relevant consideration, and personal financial gain may weigh heavily in favor of
23 a scienter reference, we agree with the Seventh Circuit that ***the absence of a
24 motive allegation is not fatal.***" *Tellabs*, 551 U.S. at 324.

25 *Id.* at *39 (emphasis added).

26 DATED: November 10, 2009

HULETT HARPER STEWART LLP
KIRK B. HULETT
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27 /s/ Kirk B. Hulett
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PROOF OF SERVICE

Sandra Lifschitz v. Nextwave Wireless Inc., et al.

CASE NO: 3:08-CV-01697 LAB (WMC)

Alex Benjamin v. Nextwave Wireless Inc., et al.

CASE NO. 3:08-CV-01934 LAB (CAB)

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action. I am employed in the County of San Diego, State of California. My business address is: 525 B Street, Suite 760, San Diego, CA 92101.

That on November 10, 2009, I served the following document(s) entitled: **NOTICE OF RECENT AUTHORITY IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED COMPLAINT** on ALL INTERESTED PARTIES in this action.

☐ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as listed below, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in San Diego, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY CM/ECF Electronic Service:** I caused such document to be served via the Court's (NEF) electronic filing system on all registered parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 10, 2009, at San Diego, California.

/s/ Kirk B. Hulett

KIRK B. HULETT